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THE GENERAL DUTY OF GOOD FAITH—ITS RECOGNITION AND CONCEPTUALIZATION

Robert S. Summers†

INTRODUCTION

The text of section 205 of the Restatement (Second) of Contracts, adopted by the American Law Institute in 1979 and published in final form in 1981, provides:

§205. *Duty of Good Faith and Fair Dealing* Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.¹

This section, together with its accompanying Comment and Reporter's Note, recognizes and conceptualizes a general duty of good faith and fair dealing in the performance and enforcement of contracts in American law.² In addition, a number of other sections and Comments particularize the bearing of this general duty in various ways.³

The first Restatement of Contracts, which appeared in 1932, did not include a section comparable to section 205.⁴ This new section reflects one of the truly major advances in American contract law during the past fifty years.

The late Robert Braucher, then Professor of Law at Harvard Law School, was the Reporter for the *Restatement Second* during the years when section 205 was in embryo, and he drafted it. Professor Braucher acknowledged that an article I wrote on the subject published in 1968 substantially influenced the recognition and conceptualization of good faith in section 205.⁵ It is therefore probably not inappropriate for me

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¹ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

² See Appendix (containing text of § 205, its Comment, and accompanying Reporter's Note).

³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 34, 74, 157, 172, 176, 188, 228, 241, 248, 251, 257, 259, 264, 265, 277 (1979).

⁴ See generally RESTATEMENT OF CONTRACTS (1932).

⁵ See note 25 and accompanying text *infra*. The article is Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195

to offer some remarks on the occasion of its final official publication. I hasten to say, however, that I now have relatively little to add to my earlier, somewhat extended study, with perhaps two exceptions.⁶

The questions I will consider briefly here are these: What was the basis upon which the general duty in section 205 was recognized? How did the draftsman conceptualize good faith in section 205, and how might one respond to the various criticisms that have been made of this type of conceptualization? And is there anything of general value that draftsmen, judges, and others might learn about conceptualization for the law's purposes from our legal experience thus far with efforts to conceptualize good faith? In addressing these questions, I will not set forth and discuss the now vast body of judge-made and statutory law in the background. A large number of articles, including my own earlier one, treat this law at length.⁷

Section 205 represents a major advance for several reasons. First, the sheer volume of case law and statutory development it reflects is vast. Second, the section symbolizes a commitment to the most fundamental objectives a legal system can have—justice, and justice according to law.⁸ Thus, it is of a piece with explicit requirements of “contractual morality” such as the unconscionability doctrine⁹ and various general equitable principles.¹⁰ The increasing recognition of such requirements is one of the hallmarks of the law of our time. Third, although the general duty of good faith and fair dealing is no more than a minimal requirement (rather than a high ideal), its relevance in contractual matters is peculiarly wide-ranging, and it rules out many varieties of bad faith in a diverse array of contexts. Fourth, section 205 embodies a general requirement that has a distinctively significant role to play in

(1968) [hereinafter cited as *Good Faith*]. At the December 1967 meeting of the Association of American Law Schools, I had two lengthy discussions with Professor Braucher about good faith in general contract law and the sales provisions of the Uniform Commercial Code. I might also add the following for those beginning law professors who might be moved to address their writings solely to judges. In the late 1960s a well known commercial law scholar at the University of Michigan remarked to me that the foregoing article would have little or no effect on further developments in our law because it was conceptually “too difficult for most judges to follow.”

⁶ The exceptions have to do with some further thoughts I now have on the art of conceptualization for legal purposes, and on the bearing of the rule of law and associated values here. See Parts II A and II D *infra*.

⁷ See Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981) [hereinafter cited as *Article 2 Good Faith*]; Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) [hereinafter cited as *Breach of Contract*]; Summers, *Good Faith*, *supra* note 5, at 203, 216-52 (citing cases).

⁸ Summers, *Good Faith*, *supra* note 5, at 198.

⁹ See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* ch. 4 (2d ed. 1980).

¹⁰ See generally Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. L. REV. 906 (1978).

the law. It is a kind of "safety valve" to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language.¹¹ Finally, as an explicit general requirement, it has all the advantages of a direct and overt tool rather than an indirect and covert one.¹² In the long history of contract, judges who have not had such a tool ready to hand have either had to leave bad faith unredressed or resort to indirect and covert means,¹³ thereby fictionalizing the law or otherwise begetting unclarity, unpredictability, or inequity.¹⁴

Of course, Restatement recognition of a general duty of good faith is important in its own way.¹⁵ The American Law Institute is a group of distinguished professors, judges, and practitioners. It is the only body that undertakes to single out developments ripe for recognition as generally authoritative. Judges usually accord its various "Restatements" considerable respect, and some courts regard these formulations as "the law."¹⁶

I

RECOGNITION

The general requirement of good faith recognized in section 205 is based on numerous judicial opinions imposing a duty of good faith, several major statutory developments, and the published writings of professors of law. By the late 1960s, when section 205 (then numbered section 231) was being drafted, the accumulation of case law imposing a duty of contractual good faith outside contexts of "good-faith purchase" was considerable. In particular, the courts of two leading states, New York and California, had by then rendered many decisions affording relief for various forms of bad faith in contractual relations; the corpus of decisions from other jurisdictions was sizeable too.¹⁷ Moreover, no American case had been found in which the court said that "good faith is not required in the performance of a contract or in enforcement of a contract."¹⁸ In my 1968 article, I sought to provide a survey and catalogue of many of the relevant cases. Thus there were many decisions in which judges had recognized and ruled out a number of general types of bad

¹¹ See Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 779-80 (1969).

¹² See generally Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1959).

¹³ For numerous examples of such resort, see Holmes, *A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 388-89 (1978); Summers, *Good Faith*, *supra* note 5, at 231.

¹⁴ See Summers, *Good Faith*, *supra* note 5, at 198-99.

¹⁵ See generally Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981).

¹⁶ Courts in many states have often cited the Restatements as more or less direct authority. See, e.g., AMERICAN LAW INSTITUTE, *RESTATEMENTS IN THE COURTS*.

¹⁷ Summers, *Good Faith*, *supra* note 5, at 216-52.

¹⁸ 47 ALI PROCEEDINGS 490 (1970).

faith in performance, including: evasion of the spirit of the deal; lack of diligence and slacking off; wilful rendering of only substantial performance; abuse of a power to determine compliance; and interference with, or failure to cooperate in, the other party's performance. In such cases, the courts went beyond the more familiar standards of performance—for example, the specific terms of agreements, general gap-filler law, course of dealing, and custom and usage—and invoked a general requirement of good faith. Many courts proceeded similarly in coping with various forms of bad faith in the assertion, settlement, and litigation of contract claims and defenses. Among other things, they ruled out bad faith in the form of: conjuring up a pretended dispute in order, for example, to lay a basis for a settlement; asserting an overreaching or “weaseling” interpretation or construction of contract language; taking advantage of another's necessitous circumstances to secure a favorable modification; making harassing demands for assurances of performance; wrongfully refusing to accept performance; wilfully failing to mitigate damages; and abusing a power to determine compliance or to terminate a contract. In section 205 of the *Restatement Second*, and in the accompanying Comment and Reporter's Note, Professor Braucher adopted nearly all of the foregoing categories, and most of the Illustrations in the Comment are based on cases decided before 1970 that fall into these categories.¹⁹

The *Restatement Second* “authority” for section 205 was not, however, confined to general contract case law. The authority for the section 205 requirement—as distinguished from the conceptualization of good faith that it incorporates—also included statutory law, particularly provisions of the Uniform Commercial Code.²⁰ By the late 1960s, this new uniform act had been adopted in a majority of states. Many of its sections and Comments imposed specific duties of good faith. Moreover, one of its most famous provisions is section 1-203, which states that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”²¹ This general obligation was, in the 1950s, a major innovation in American statutory law, and is the closest ancestral authority for the *Restatement Second*'s section 205. It is hardly surprising, then, that the first Comment to section 205 opens with references to Uniform Commercial Code provisions on good faith.²² The next section of this Article, dealing with the conceptualization of good faith in the *Restatement Second* suggests, however, that the Uniform Commercial Code and the *Restatement Second* diverge significantly.

¹⁹ Compare RESTATEMENT (SECOND) OF CONTRACTS § 205, Comments d-e, Reporter's Note (1979) with Summers, *Good Faith*, *supra* note 5, at 232-52.

²⁰ See Summers, *Good Faith*, *supra* note 5, at 195, 207-16.

²¹ U.C.C. § 1-203.

²² RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment a (1979).

The general "legislative" history of section 205 is not extensive. Prior to 1981, two versions had appeared, one in 1970²³ and one in 1973,²⁴ and both were numbered "section 231." There were no significant differences between the two versions. The 1970 version was presented formally at the May 1970 meeting of the American Law Institute in Washington, D. C., and it was then tentatively adopted. The transcript of the 1970 Proceedings of the American Law Institute includes the following:

PROFESSOR BRAUCHER:

Well, I could, then, go to Topic 2, which has some somewhat more novel provisions in it. You could use a different heading, but I don't know that it would be much more informative.

This is matters which are related to interpretation, but are not strictly the meaning of the parties. They are considerations brought in, and I think fairness and the public interest is a pretty fair description of them; and Section 231 is entirely new to the Restatement, although it is not new to the law.

Now, I have been asked about Section 231: Is this really a restatement of the law? Isn't this an attempt, you know, to write the Sermon on the Mount into the Restatement of Contracts?

And the answer is: I think there is a good deal of judicial authority for the proposition. The precise formulation of it is taken out of the Uniform Commercial Code, but I think in the history of that in the Commercial Code it was not thought of as a novel proposition in the law.

I should call attention to a limitation on this. The black letter is limited, as is the section of the Commercial Code, to good faith in performance and enforcement, and is not a requirement, as stated here, of good faith in bargaining, good faith in offer and acceptance.

Now, there are some obligations of good faith and fair dealing in the making of a contract, as distinguished from performance and enforcement. I don't think you can find a case in the whole history of the common law in which a court says that good faith is not required in the performance of a contract or in enforcement of a contract.

Now, the trouble with this section, of course, is that it's very general, very abstract, and it needs specification the worst way, and specification is not to be had. I am indebted for its formulation here in the comments—formulations in the comments—to Professor Summers in a piece cited on page 100. He made considerable effort and collected this very large number of cases in which judicial opinions had insisted on some obligation of good faith and fair dealing in the performance and enforcement of contracts. And then he tried to categorize them, and I have borrowed heavily from his classification scheme in giving a little more detail about this.

²³ *Id.* § 231 (Tent. Draft No. 5, 1970).

²⁴ *Id.* § 231 (Revised and Edited ed., Tent. Draft Nos. 1-7, 1973).

But I don't want to try to disguise what's being said here. This proposition is thoroughly acceptable if you define good faith very narrowly; but as you define good faith more broadly, doubts begin to arise, and I put in the Reporter's Note on page 100 a reference to what happened to the law of Germany under the heading of—of course, in German—good faith. It became, in the days of the great inflation following World War One a license for judicial remaking of contracts way beyond anything that ever happened in the United States.

Now, I suppose if we got to a place where you had 25 per cent inflation every month that you might find some judicial activism here too. Hopefully, we don't have to face that problem.

Anyway, the principle is to be found in judicial opinions. I haven't invented it. It's also to be found in the Commercial Code. I think there are more judicial opinions along this line in the New York Court of Appeals and the Supreme Court of California than there are in most of the other courts, but I have been told that some lovely illustrations of this can be found in the decisions of the Court of Claims, and I have requested additional enlightenment on that, because I'm not as familiar with those decisions, perhaps, as I should be. Anyway, there it is. [There was no comment]

I'm amazed²⁵

The final version of the general Restatement obligation of good faith, renumbered in section 205 with Comment, was officially published in 1981 and included only minor changes.²⁶ Perhaps most noteworthy are the new references in the Reporter's Note to further supporting court decisions rendered after the late 1960s, when section 205 was first formulated. Thirteen such cases are cited, and these by no means represent all or even necessarily the most important such decisions on contractual good faith rendered between the late 1960s and 1981.²⁷

From time to time in the history of the American Law Institute's various "Restatement" ventures, a particular Restatement section has been challenged on the ground that it lacked legitimacy. Usually the challenge has taken the form of a claim that the section at hand was based on nonexistent case law, was contrary to the case law, or went beyond case law in some way. It should by now be evident that no such

²⁵ 47 ALI PROCEEDINGS 489-91 (1970).

²⁶ Besides the addition of case authority in the 1981 final version, one should note that: (1) in the 1973 version, a clause at the end of the first sentence of Comment c, "but bad faith in negotiation is also subject to sanctions," was dropped from the 1970 version; (2) the concluding sentence of Illustration 4 of the 1970 version was reformulated in the 1973 version; and (3) in the 1981 version, Illustration 6 was dropped from the 1973 draft.

²⁷ For a useful collection of additional cases dealing with good-faith performance, see Burton, *Article 2 Good Faith*, *supra* note 7; Burton, *Breach of Contract*, *supra* note 7.

claim can be asserted plausibly with respect to section 205. It enjoys full-fledged Restatement legitimacy.

II

CONCEPTUALIZATION

I will begin with some preliminary remarks on the general problem of conceptualization as it arises for draftsmen and others in the law.²⁸ I will then describe the "excluder" conceptualization of good faith in section 205 and the Comment, explain its origins, and contrast it with the conceptualization of good faith in the Uniform Commercial Code. I will also consider the extent to which section 205 is consistent with the "rule of law" and values associated with that ideal.

A. *The General Problem of Conceptualization*

As the term is used here, a "conceptualization" is an intellectual construct that represents or embodies an idea formulated in words for some general or special purpose or purposes.²⁹ When a draftsman is formulating a legal requirement, he may be called upon to conceptualize some idea, or ideas, to appear in the explicit language of the requirement itself or in an accompanying official Comment or other authoritative legislative history. The purpose, or purposes, of the legal requirement involved—and thus of the conceptualization—may be to fulfill one or more general norms of right behavior (such as the fulfillment of just expectations) or to serve some general or particular social goal (such as safety, or the facilitation of personal economic pursuits).³⁰ The legal requirement involved may be in the nature of a very general principle or maxim, or it may take the form of a specific detailed rule. The idea (or ideas) may be, as in the case of good faith, one that is already familiar from some moral or legal context or realm of discourse, or the idea may be one that is (or is to be) entirely or very largely the law's own creation, such as "demurrer" or "tax deduction." The idea may be one that is to figure directly in the characterization of ordinary human action or inaction, such as "acting in good faith." Or it may be one that is only indirectly or remotely related to ordinary daily human action, such as "jurisdiction" or "future interest." If the idea has to do with human action, the action involved may be of a kind that is highly

²⁸ In my earlier article, I failed to distinguish clearly between this problem as it arises for those who are seeking to interpret and apply case law or written law, and the problem as it arises for draftsmen. This was a serious failure. In the case of what I will call "excluder" conceptualizations (*see* text accompanying note 29 *infra*), however, it turns out that they may serve both as useful approaches to interpretation and as models for the draftsman.

²⁹ I do not intend this to be a formal definition.

³⁰ On this basic distinction (really a set of differences), see Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

diverse, such as "contracting behavior," or it may be of a kind that is relatively invariant and discrete, such as "filing a tax return." And if the idea has to do with human action, it may relate to some mental element in that action, or it may not.

The foregoing and still other variations affect the problem of conceptualization that the draftsman faces. One further variation merits extended emphasis here. The idea or ideas to be conceptualized for purposes of the legal requirement may yield felicitously to one method of conceptualization (or perhaps more) but not to others. This is particularly so of certain ideas already known to us from prior social or legal experience. When such an idea has a special integrity of its own,³¹ the draftsman will not be entirely free to treat it merely as he wishes, even for the law's own special purposes. If he does so, he will at the very least risk confusing those to whom the law is addressed. He will also risk the possibility that the conceptualization he adopts will otherwise fail to serve the legal purposes he has in mind. This does not mean that in formulating his conceptualization the draftsman can never inventively reconstruct the idea to serve better the law's purposes. It does mean that whatever the extent of any reconstruction, the conceptualization must still remain sufficiently faithful to the idea or ideas involved.³² As we will see, the draftsman of the Uniform Commercial Code's provisions on good faith (himself a brilliant professor of law) did not sufficiently grasp this general truth.

With regard to such ideas, it is important for the draftsman to try to get them "straight" in the first place before undertaking any formulation of them for the law's purposes, let alone any possible reconstructive conceptualization of them. He will be best equipped to do this if he has some understanding of various general methods of conceptualization and of how a given idea may yield to one method (or perhaps more) but not to others. This is not the place for an extended essay on the different methods of conceptualization that a draftsman might employ; it will be enough for now merely to provide a highly abbreviated, yet suggestive, listing of several such methods:

1. Conceptualization by formal definition—*e.g.*, resort to necessary and sufficient conditions for the use of a word or phrase.

³¹ "Integrity" may not be the best word here. That many ideas have such integrity (or the like) is seldom denied in the case of scientific and technological ideas that may have to be incorporated into the law in some way. Yet many people are skeptical when it comes to non-scientific and non-technological ideas. In my view, such *a priori* skepticism is unfounded. Thus, lawyers should be wary of the "Humpty Dumpty" syndrome: "When I use a word, it means just what I choose it to mean—neither more nor less." L. CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* ch. 6 (1871).

³² What counts as "sufficiently faithful" is problem-specific and cannot be usefully formulated in the abstract, or specified in advance.

2. Conceptualization by synonymous paraphrase of the word or phrase in question (including contrastive paraphrase).
3. Conceptualization by paradigmatic sample, specifying what is required for the use of the word or phrase.
4. Conceptualization mainly by recital or representative examples illustrating the application of the word or phrase.
5. Conceptualization by specification of family resemblances that run through diverse uses of the word or phrase.
6. Conceptualization by way of "excluder analysis."

This is not an exhaustive list. The use of each of the above methods for legal purposes could be the subject of a separate essay.³³ For now, I only wish to stress that there are various methods of conceptualization on which legal draftsmen may draw; and that although some ideas may be fruitfully conceptualized in more than one way, certain others may (for the law's purposes) yield felicitously to only one method, and that draftsmen would do well to heed these truths. Otherwise, they may improperly conceptualize the ideas involved. This will very likely frustrate the law's purposes, either through the confusion it may breed, or through any resulting maladjustment of means to ends. The adequacy of a conceptualization may be judged by three related criteria: (1) whether it is sufficiently faithful to the idea involved; (2) whether it serves sufficiently the purposes of the legal requirement being formulated; and (3) whether it serves the more general legal purposes associated with the expression "the rule of law."

B. "Excluder" Conceptualizations

Some ideas yield to this mode of conceptualization, and it has been my view since the mid-1960s that this is true of the idea of good faith. I will not here repeat the extended excluder analysis of good faith that I set forth in my 1968 article.³⁴ I will merely summarize its essence. In my view, some words and phrases do not have a general positive meaning of their own within the contexts or realms of discourse in which they are at home. Instead, these words or phrases function to rule out various things according to context. The notion that some ideas are of this character was not my invention and is hardly novel. The excluder conceptualization may have appeared first in Aristotle's writings.³⁵ The late

³³ It would be well if we had such an essay or essays addressed specifically to the legal draftsman. Most of the relevant writing is by philosophers and is done for non-legal purposes. See, e.g., R. ROBINSON, *DEFINITION* (1950); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 1958); Hall, *Excluders*, 20 *ANALYSIS* 1 (1959); Hart, *The Ascription of Responsibility and Rights*, 49 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 171, 181 (1949) ("defeasible" concepts); McGuinness & Matthews, *Meaning and Contrast*, 43 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* (Supp. Vol. 85, 1969).

³⁴ See Summers, *Good Faith*, *supra* note 5, at 199-207.

³⁵ 3 ARISTOTLE, *NIGOMACHAEN ETHICS* (W. Ross trans. 1925).

Professor J. L. Austin of Oxford University made much of it. His discussion of the term "real" is illuminating:

That is, a definite sense attaches to the assertion that something is real, a real such-and-such, only in the light of a specific way in which it might be, or might have been, *not* real. "A real duck" differs from the simple "a duck" only in that it is used to exclude various ways of being not a real duck—but a dummy, a toy, a picture, a decoy, &c.; and moreover I don't know *just* how to take the assertion that it's a real duck unless I know *just* what, on that particular occasion, the speaker has it in mind to exclude. This, of course, is why the attempt to find a characteristic common to all things that are or could be called "real" is doomed to failure; the function of "real" is not to contribute positively to the characterization of anything, but to exclude possible ways of being *not* real—and these ways are both numerous for particular kinds of things, and liable to be quite different for things of different kinds. It is this identity of general function combined with immense diversity in specific applications which gives to the word "real" the, at first sight, baffling feature of having neither one single "meaning", nor yet ambiguity, a number of different meanings.³⁶

In addition to the word "real," itself not really a word much used in the law, one might cite many other notions at work in the law that do yield best to an excluder analysis. "Voluntary," as it is generally used not only in moral discourse, but also in the criminal law, is very likely an excluder. H. L. A. Hart once observed that "the word 'voluntary' in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, mistakes, etc., and not to designate a mental element or state"³⁷ Requirements of equality in many branches of the law probably yield best to an excluder analysis, according to which these requirements rule out a heterogeneous variety of forms of unjustified discrimination. Presumably the same goes for certain legal requirements of fairness. One scholar has even claimed that the notion of justice itself is best analyzed in these terms.³⁸

In my view, good faith in the general requirement of good faith in ordinary moral dealings, and in the general case law of contract up to the late 1960s, was most felicitously conceptualized as an "excluder." That is, it was not appropriately formulable in terms of some general positive meaning—through the specification of a set of necessary and sufficient conditions, for example; rather, it functioned as an excluder to rule out a wide range of heterogeneous forms of bad faith. This is not to say that paraphrase, example, and other methods of conceptualization

³⁶ J. AUSTIN, *SENSE AND SENSIBILIA* 70-71 (G. Warnock ed. 1962) (emphasis in original).

³⁷ Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 171, 180 (1949).

³⁸ Wooley, *Injustice*, 7 AM. PHIL. Q. MONO. SER. 109 (1973).

cannot also cast still further light on this corner of the law. Nor is it to deny the distinctively illuminating power of the purposes behind such a requirement in determining its scope and limits,³⁹ a topic to which I will return. Nor, finally, is it to deny that judges should try to articulate criteria to be used to decide whether particular conduct claimed to be in bad faith really is so—criteria that must inevitably vary somewhat from context to context.⁴⁰ I will return later to this topic as well.

C. *The Restatement's Conceptualization of Good Faith as an "Excluder"*

Professor Braucher did not attempt to provide a conceptualization of any assumed general positive content of the expression "good faith" as it appears in section 205, nor did he seek to so conceptualize it in the Comments or Reporter's Note to section 205. Thus, for example, he did not undertake to define good faith in terms of some assumed general, invariant, and synonymous meaning such as "honesty in fact in the . . . transaction," as did the draftsman of the Uniform Commercial Code.⁴¹ Indeed, he provided no general definition of good faith at all.⁴² All this, of course, is consistent with the excluder analysis.

He did assume, as did I in my 1968 article, that it is possible to formulate specific positive meanings for particular uses of "good faith," by way of contrast with the specific forms of bad faith being ruled out in the context. These meanings would vary "somewhat with the context."⁴³ But he did not then go on to try to generalize from these and set forth a single, positive, and unified general meaning of good faith as used in section 205. Rather, he stressed that the section 205 requirement of good faith "excludes a variety of types of conduct characterized as involving 'bad faith,'" including evasion of the spirit of the bargain, lack of diligence and slacking off, abuse of a power to specify terms, conjuring up a dispute to force a settlement or modification, wilfully failing to mitigate damages, and so on.⁴⁴ Many theorists have been tempted to try to conceptualize all these forms of bad faith, partly in terms of some necessary or singular "mental element," such as a "bad motive." But Professor Braucher saw that this would not do either, and stated: "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction,

³⁹ I articulated such purposes in my earlier article, Summers, *Good Faith*, *supra* note 5, at 198-99, but I failed to develop them.

⁴⁰ I recognized this in the *Good Faith* piece, *supra* note 5, at 206, but I should have gone further.

⁴¹ See U.C.C. § 1-201(19).

⁴² See Appendix.

⁴³ RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment a (1979).

⁴⁴ *Id.* § 205, Comments a, d, e.

and fair dealing may require more than honesty."⁴⁵

Professor Braucher did go on to try to articulate the general purposes of the section: that of securing "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," and compliance with "community standards of decency, fairness or reasonableness."⁴⁶ But this is not the same as specifying a general positive meaning for the expression as it appears in section 205. This remains true even if one concedes, as I certainly would, that the section must be interpreted and applied in light of its purposes.⁴⁷ Furthermore, as a corollary of the excluder conceptualization, Professor Braucher stressed that a "complete catalogue of types of bad faith is impossible."⁴⁸

In my view, the conceptualization of good faith as an excluder in section 205, the Comment, and the Reporter's Note satisfies the relevant criteria of adequacy. It is sufficiently faithful to the nature of the basic idea involved, and it is aptly designed to serve the general substantive purposes of the legal requirement involved, including the fulfillment of just expectations. Also, it is not defined restrictively and therefore can be deployed in unforeseen circumstances as a kind of safety valve. It also can sufficiently serve the more general purposes connoted by the phrase "the rule of law." For now I will only undertake specific discussion of this last point.

D. *Consistency of the Restatement Conceptualization with the "Rule of Law"*

The rule of law does not require that all forms of law consist of rules.⁴⁹ Section 205 itself, with its excluder conceptualization, is not a rule; it is more in the nature of a principle or maxim, and if I am right, this is as it should be. Section 205 is an unusually "circumstance-bound" requirement, and excludes highly varied forms of bad faith, many of which become identifiable only in the context of circumstantial detail of a kind that defies comprehensive formulation in a single rule.⁵⁰ Those who would insist in the name of the rule of law that all forms of law must consist of specific detailed rules addressed to narrow patterns of fact have very likely not thought through the implications of their position.⁵¹ In the field of commercial law alone, this would require sub-

⁴⁵ *Id.*, Comment d. *But see* Burton, *Breach of Contract*, *supra* note 7, at 384-87.

⁴⁶ RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment a.

⁴⁷ In my own earlier article, I stated these purposes somewhat differently, but there is very great overlap between the two statements. *Compare id.* § 205, Comment a *with* Summers, *Good Faith*, *supra* note 5, at 198-99.

⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment d (1979). *See generally* Summers, *Good Faith*, *supra* note 5, at 199-207; *see also id.* at 206.

⁴⁹ *See generally* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 2 (1978); L. FULLER, *THE MORALITY OF LAW* (2d ed. 1969).

⁵⁰ *See* Summers, *Good Faith*, *supra* note 5, at 203, 215-16.

⁵¹ Nor have they thought through their motives. I have met lawyers from time to time who seem to believe that those responsible for the law always owe lawyers an obligation to

stantial revision, including an overhaul of the Uniform Commercial Code. Not only would section 1-203 on good faith have to go, but so would section 1-103 on general equitable principles and section 2-302 on unconscionability. Many other provisions would at least have to be revised and narrowed.

Although section 205 of the *Restatement Second* is as it should be, it does not follow that the numerous and varied contexts to which it is addressed cannot, *in addition*, be governed by still other forms of "good-faith" law.⁵² As we have seen, the *Restatement Second* itself includes several further provisions that, among other things, purport to particularize the requirement of section 205 in given contexts. Beyond these provisions, one can identify three further (to some extent overlapping) forms of good-faith law addressed to many of these contexts which are now either more or less fully formed or in process of development. First, we now have a vast accumulation of *holdings with stated reasons*. The generality implicit (and sometimes explicit) in this form of law is often considerable.⁵³ Second, courts and scholars are now, for some of these contexts, beginning to formulate *lists of criteria* for identifying specific forms of bad faith.⁵⁴ The generality of such criteria represents a form of law of long-standing respectability in our legal experience. It was law of this type that I had in mind when, in my earlier piece, I wrote that: "No effort has been made here to identify the criteria which judges ought to use in deciding particular conduct is in bad faith, although enough has been said to show that these criteria must vary from context to context."⁵⁵ Third, the accumulation of experience with respect to some contexts might be sufficiently extensive, and the circumstantial attributes of these contexts sufficiently amenable, to permit the formulation of *detailed rules* that rule out specific forms of bad faith. I have not tried my hand at constructing such rules, but I would not be surprised if some could now be so formulated to go beyond those already recognized in the *Restatement Second* sections that are corollaries of section 205.

create and package that law in the form of tiny bits, the scope of which is always totally certain and easily ascertainable in advance. Why? Because, it is said, lawyers must earn a livelihood and law of this sort is the kind most saleable to clients!

⁵² Although I recognized this in my 1968 article, I did not stress it enough.

⁵³ The best theoretical treatment of this legal element is in the field of constitutional law, but it also applies, *mutatis mutandis*, to contract and commercial law. See Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

⁵⁴ The most detailed example to date is probably Professor Hillman's treatment of bad faith modifications of contracts. See Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680 (1982); Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979). For another example of an effort to articulate specific criteria in still another context, see Holmes, *supra* note 13, at 451.

⁵⁵ Summers, *Good Faith*, *supra* note 5, at 206. If I were to revise this formulation now, I would insert "somewhat" after "vary," and would go on to set forth the substance of what I say in this entire subsection of the present Article.

It may be said that all this *presupposes* relevant pre-existing law (of one or more of the foregoing three forms) addressed to the specific context at hand, and that courts, when faced with as yet judicially *unaddressed* contexts, will be essentially without the guidance required by the values of predictability and the uniformity demanded by the rule of law. Indeed, it may be said that if good faith is conceptualized merely as an excluder, judges will be free simply to call anything they wish "bad faith." Thus, in such cases the law merely will be whatever the judges say it is.⁵⁶ Now this must be seen for what it is—namely, a broadside attack, however implicit, on section 205 itself, largely in the name of the rule of law. For in cases of the type envisioned, the judges will at least have section 205, the Comment, and the Reporter's Note to go on. The attack is also, one may add, a broadside attack on the judgment of Professor Braucher, his *Restatement Second* cohorts, and the American Law Institute. Of course, none of these individuals or groups qualifies for unimpeachable legal sainthood. But their collective wisdom is not something to be taken lightly. And it should be remembered, in particular, that of all academics associated with contractual and commercial law reform in his day, Professor Braucher was notoriously one of the most hard-headed and practically minded. Predictability and uniformity were high on his list of legal values.

In my view, a judge in a novel case posing an issue of good faith under section 205 with its excluder conceptualization is far from lacking meaningful guidance of the kind legitimately to be demanded in the name of the rule of law. He should start with the language of the section. Second, he should turn to the purposes of section 205 as set forth mainly in Comment a. These purposive rationales will infuse the excluder analysis with meaning in all the ways that purposive interpretation is known generally to provide guidance to judges (as in the case of statutes).⁵⁷ Third, after completing this, he should seek guidance by the time-honored common-law method of reasoning by analogy, not only from past cases, but from the various illustrations set forth in the Comments to section 205. Such reasoning, particularly that which is done with an eye to the *reasons* given by prior judges, can provide substantial insight into how novel cases should be decided. Fourth, also in light of the purposes of section 205 and any general analogies, he can analyze the relevant facts—alleged or proven—to see what specific reasons these facts, and the values they implicate, generate for and against characterizing the action or inaction in question as bad-faith behavior. Fifth, be-

⁵⁶ Several commentators have in fact suggested as much. See, e.g., Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 650; Holmes, *supra* note 13, at 401-02.

⁵⁷ See generally L. FULLER, *THE ANATOMY OF LAW* 14-18, 38-39, 56-59, 82-86, 95 (1968); L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); L. FULLER, *supra* note 49, at 81-91, 224-32; Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

cause of the very nature of the problem, the excluder analysis is not only faithful to the reality involved, but it is itself a distinctive source of illumination. It does not focus on some presumed positive and unitary element or cluster of elements called "good faith"; instead, it focuses on whether the alleged form of bad-faith behavior really is, in the context, ruled out by section 205, when considered in light of its purposes and in relation to the facts of the case.⁵⁸ The foregoing factors do not exhaust all the forms of guidance that section 205 provides, but they are more than sufficient to rebut the charge that a section in which good faith is conceptualized as an excluder leaves the judges at sea and the "law" merely whatever the judges say it is.

It may be added that the lengthy German experience with a comparably general requirement of good faith in its contract law has *not* been a legally unhappy one. The requirement has not proliferated into the kind of mere ad hoc judicial caprice that some critics of a section such as *Restatement Second* section 205 presumably would have predicted.⁵⁹

E. *Relative Inferiority of the Uniform Commercial Code Conceptualization*

As we have seen, the Uniform Commercial Code includes a general section like *Restatement Second* section 205. Section 1-203 of the Code provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." In addition, many sections of the Uniform Commercial Code, and numerous Official Comments, impose particular duties of good faith.⁶⁰

This body of Code law served as one of the authoritative underpinnings of the *Restatement Second's* section 205. But there ends the Code influence.⁶¹ Section 205 conceptualizes good faith as an excluder; the Code's section 1-203 does not do so.⁶² The Code section and accompanying definitions generally conceptualize good faith as "honesty in fact." Professor E. Allan Farnsworth observed in 1963 that this restrictive con-

⁵⁸ Moreover, one need not know the "one and only correct interpretation" of a transaction to know when an interpretation is obviously incorrect. See Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CALIF. L. REV. 375, 422 (1975).

⁵⁹ See generally J. DAWSON, *THE ORACLES OF LAW* 461-502 (1968). I have not, incidentally, sought to apply the excluder analysis to the German case law, but it seems more than a little likely that it would apply.

⁶⁰ See Summers, *Good Faith*, *supra* note 5, at 195, 207-16.

⁶¹ It should also be noted that both formulations are restricted to "performance" and "enforcement"; they do not explicitly extend to the negotiation stage. Some differences in wording might be noted, too: (1) the *Restatement Second* includes the words "and fair dealing," but the Code provision does not, and (2) the Code provision applies the requirement of good faith to every "contract or duty within this Act," whereas the *Restatement Second* applies only to "every contract."

⁶² The commentators almost always fail to point out this fundamental difference. See, e.g., Holmes, *supra* note 13, at 390.

ceptualization of good faith "enfeebled" the Code's section 1-203, because many forms of contractual bad faith do not involve dishonesty as such.⁶³ In my 1968 article I sought to demonstrate the truth of this at some length.⁶⁴ The narrowness of the foregoing conceptualization was only partially mitigated by the fact that the honesty definition was prefaced with the words "unless the context otherwise requires," and that certain other sections of the Code incorporated a less restrictive definition.⁶⁵ Here, then, is a striking example of the failure of a draftsman (Professor Karl N. Llewellyn) to conceptualize an idea in a manner sufficiently faithful to its own basic character.⁶⁶ This underscores the importance of recognizing problems of conceptualization in the law for what they are—they are not merely formal matters of selecting linguistic expressions.⁶⁷

Professor Braucher understood as much. He recognized that the Code's general conceptualization of good faith as "honesty in fact" was too narrow. He stated, in particular, that a "focus on honesty is appropriate to cases of good-faith purchase; it is less so in cases of good-faith performance."⁶⁸ In drafting section 205, he was mindful of the impossibility of devising a definition of a general positive meaning for good faith that would avoid the twin hazards of colliding with the Scylla of restrictive specificity and spiraling into the Charybdis of vacuous generality. He eschewed general definitions altogether and instead conceptualized the requirement of good faith in section 205, the Comment, and the Reporter's Note in terms of excluder analysis. Thus, section 205 of the *Restatement Second* is superior in conceptualization to its Uniform Commercial Code counterpart.

III

SOME REPLIES TO CRITICISMS

The type of general requirement of good faith embodied in section 205, including its excluder conceptualization, has already generated considerable commentary.⁶⁹ Most of the commentators agree that some

⁶³ Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 673-74 (1963). The same may be said of the restrictive definitions that, alas, appear in the Model Consumer Credit Act § 1.201 (1973) and the Uniform Consumer Credit Code § 1.110 (1974).

⁶⁴ Summers, *Good Faith*, *supra* note 5, at 210-12.

⁶⁵ *Id.* at 212-14.

⁶⁶ There were, in my view, several different explanations for this. See *id.* at 215.

⁶⁷ Many persons in and out of the law frequently appear to assume that what I here call the task of conceptualization is a mere matter of "expression."

⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment b (1979).

⁶⁹ See, e.g., Burton, *Breach of Contract*, *supra* note 7; Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 54 MARQ. L. REV. 1 (1971); Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619; Holmes, *supra* note 13; Stankiewicz, *Good Faith Obligation in the Uniform Commercial Code: Problems in Determining Its Meaning and*

such requirement is desirable, but many offer criticisms and suggestions for improvement. Because I believe that section 205 is on the whole an admirable piece of work, I will here address and respond to a number of criticisms directed, implicitly or explicitly, to that section. I will devote a number of my remarks to the writings of Professor Steven Burton, who has recently published two articles⁷⁰ that should, if any can, arouse me from my dogmatic slumbers.

A. *The Rationales for a Good-Faith Requirement*

The rationales for a general requirement of good faith, such as those appearing in section 205, are of fundamental significance. They provide judges with indispensable guidance and may even serve as a kind of unifying "theory" that, if anything can, ties various decisions together. In my view, there are two primary rationales for such a section: it is a means to "justice and to justice according to law."⁷¹ Professor Braucher did not adopt this specific formulation, but the overlap between the language he used and my own formulation is great. In his view, the good-faith requirement serves: (1) "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," and (2) "community standards of decency, fairness or reasonableness."⁷² In the general case law, judges have frequently recognized that these rationales are significantly moral.⁷³

Some commentators seem to deny that the foregoing justice-oriented rationales really are the true rationales of general good-faith requirements, and/or that they are significantly moral.⁷⁴ Yet rationales such as the foregoing are the ones most commonly stated in the case law. Moreover, Professor Braucher's language, quoted above, is the exact language of Comment a of section 205.

It is not uncommon today to find a theorist claiming that the most "appropriate" rationale for a provision such as section 205 is economic, at least in its application to good faith *performance*.⁷⁵ The requirement is said to enhance economic efficiency by reducing the costs of contracting, including "the costs of gathering information with which to choose one's contract partners, negotiating and drafting contracts, and risk taking

Evaluating Its Effect, 7 VAL. U.L. REV. 389 (1973). Of course, I do not mean to imply that all the commentators make precisely the same criticisms or are all skeptical in identical ways.

⁷⁰ Burton, *Breach of Contract*, *supra* note 7; Burton, *Article 2 Good Faith*, *supra* note 7.

⁷¹ Summers, *Good Faith*, *supra* note 5, at 198.

⁷² RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment a (1979).

⁷³ See, e.g., *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967). This is not to say that § 205 is identical to its moral counterpart. See Summers, *Good Faith*, *supra* note 5, at 204 n.46.

⁷⁴ Professor Burton does not mention justice; there is something of a tradition in American scholarship to seek to keep the law "pure of moral notions." See Holmes, *supra* note 13, at 385-87.

⁷⁵ See, e.g., Burton, *Breach of Contract*, *supra* note 7, at 392-94.

with respect to the future.”⁷⁶ The general requirement of good faith accomplishes all this by “allowing parties to rely on the law in place of incurring some of these costs.”⁷⁷ The “economically rational person” will thus “substitut[e] good faith at the margin.”⁷⁸ This claimed economic rationale requires several responses. First, it is ahistoric. As already indicated, the historical evidence favors other rationales. Second, these other rationales, at least so far as good-faith performance is concerned, are largely moral and include the principle *pacta sunt servanda* (“the obligation to keep agreements”).⁷⁹ To say that this principle is part of the rationale for a section such as 205 is hardly to render that section “superfluous.”⁸⁰ It is one function of the good-faith performance doctrine to enforce the spirit of deals, including their unspecified inner logic. Indeed, it has even been said that “it is the potential for a lack of clarity and completeness that necessitates the implication of the good faith covenant in every contract.”⁸¹ Third, it is in any case rather speculative that the rationale is economic—even in regard to a duty of good-faith performance. We really do not *know* whether general recognition of this duty is economically efficient. Many more types of costs would first have to be counted, including the allocable costs of running a legal system that administers such a doctrine. It might turn out only that the doctrine is not economically inefficient—or not obviously so—and this would be a slender reed, indeed, on which to rest section 205. Fourth, it is one function of rationales to generate, in light of the facts and law, specific reasons for the decisions of particular cases. The extent to which an economic rationale such as the one proffered can do this efficiently and otherwise satisfactorily is, as yet, undemonstrated and problematic, a matter that Mr. Kelley and I have sought to treat at length elsewhere.⁸²

B. *The Possibility That the “Excluder Analysis” Itself Has Been Ultimately Discredited*

As we have seen, good faith is conceptualized in section 205 as an excluder—having no general, positive, content of its own—which functions to rule out a wide variety of forms of bad faith. So far as I can determine, this analysis was first articulated by philosophers, including Aristotle and J. L. Austin.⁸³ One commentator has remarked that at

⁷⁶ *Id.* at 393.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Burton, *Article 2 Good Faith*, *supra* note 7, at 4.

⁸⁰ *Id.*

⁸¹ Burton, *Breach of Contract*, *supra* note 7, at 380 n.44.

⁸² Summers & Kelley, *Economists' Reasons for Common Law Decisions—A Preliminary Inquiry*,

1 OXFORD J. LEGAL STUD. 213 (1981).

⁸³ Summers, *Good Faith*, *supra* note 5, at 201-02.

least two "lawyer-philosophers" have now "rejected" this method "for legal purposes."⁸⁴ The two referred to are Mr. G. P. Baker, Fellow of St. Johns College, Oxford University, and Professor Michael S. Moore of the University of Southern California.⁸⁵ In truth, neither Baker nor Moore rejects the excluder analysis.⁸⁶

Although Baker at one point appears to conflate legal requirements incorporating ideas that are excluders with legal requirements incorporating not excluders but what Hart called "defeasible" concepts,⁸⁷ Baker's essay is actually addressed to Hart's views about the latter.⁸⁸ Ideas that function as excluders are not to be equated with Hart's "defeasible" concepts: Hart offered various requirements of liability in contract as an example of the latter. For him, contract was a "defeasible concept"—one to be analyzed in terms of a discrete set of *normally* necessary and sufficient conditions *subject to* being "defeated" by a heterogeneous variety of circumstances, such as fraud, duress, lunacy, and intoxication. Excluders are, on the other hand, not definable in terms of a set of normally necessary and sufficient conditions. Nor do they name any positive elements or states. If they name anything, they name whole dimensions of appraisal, dimensions that may be complex in their own ways. To paraphrase J. L. Austin,⁸⁹ the attempt to capture in a set of normally necessary and sufficient conditions some characteristic or characteristics common to all things that are or could be called "good faith" is doomed to failure. Of course, lawyers could reconstruct good faith so that it would yield to such an analytical approach; but if I am right, they ought not to do so.

Moreover, a close reading of Baker's admirable essay reveals that he does not, in the end, reject even Hart's defeasibility analysis as such, let alone the excluder analysis (which is different) identified and developed by Aristotle, Austin, and others. In truth, Baker very interestingly proffers an alternative semantic theory that to a significant extent may save Hart's "defeasibility" analysis.

If Baker had ultimately discredited the excluder analysis for philosophical purposes, it would not follow from this *alone* that he would have discredited it for legal purposes. The purposes of law and the purposes of philosophy are not identical. Even a philosophically-discredited excluder analysis might still provide by analogy a useful approach or

⁸⁴ Burton, *Article 2 Good Faith*, *supra* note 7, at 21 n.136.

⁸⁵ Actually, only the latter is a lawyer-philosopher.

⁸⁶ See Baker, *Defeasibility and Meaning*, in *LAW, MORALITY AND SOCIETY* 26, 43-56 (P. Hacker and J. Raz eds. 1977); Moore, *The Semantics of Judging*, 54 *S. CAL. L. REV.* 151, 237-38 (1981).

⁸⁷ Baker, *supra* note 86, at 43.

⁸⁸ See Hart, *The Ascription of Responsibility and Rights*, 49 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 171 (1949).

⁸⁹ J. L. AUSTIN, *SENSE AND SENSIBILIA* 70-71 (Warnock ed. 1962).

model for the interpretation of case law or the drafting of legal requirements.⁹⁰

I briefly turn now to the arguments of the lawyer-philosopher, Professor Moore, who is also alleged to have rejected or discredited the excluder analysis.⁹¹ It turns out that he, too, does not address the excluder analysis as such; like Baker, Moore addresses himself instead to Hart's defeasibility thesis. Thus what I have just suggested about Baker's justly famous essay applies here as well. Yet a remark of Moore's is certainly worth quoting for its analogical relevance:

As a normative thesis, defeasibility is on solid ground. Although it is possible to close the lists of [necessary and sufficient] criteria for "contract," "mens rea," and similar legal terms, they should not be closed because new cases ought to be decided on grounds of justice rather than by the way they fit in a fixed taxonomy.⁹²

C. *The General Indefinability of Good Faith*

Many commentators suggest that they are willing to accept that good faith cannot, as such, be usefully defined in terms of a single, general, positive meaning, but most of them still find this state of affairs rather difficult to live with. At one point or another, in text or in footnote, they try their hand at what seems to be tendered as a general definition. Here are some of the results:

— Good faith is an "absence of intention to harm a legally protected pecuniary interest."⁹³

— Good faith performance "occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract, interpreted objectively."⁹⁴

— Good faith and fair conduct consists of action "according to reasonable standards set by customary practices and by known individual expectations."⁹⁵

My view is that all such efforts to define good faith, *for purposes of a section like 205*, are misguided. Such formulations provide very little, if any, genuine *definitional* guidance. Moreover, some of them may restrictively distort the scope of the general requirement of good faith. For example, the factors relevant in the context may not be confined to what "custom" and communicated "expectations" dictate.⁹⁶ In addition,

⁹⁰ Incidentally, I have discussed the foregoing issues with Mr. Baker (a fellow of St. Johns College, Oxford), and he concurs with my analysis.

⁹¹ Moore, *supra* note 86, at 237-42.

⁹² *Id.* at 239.

⁹³ Burton, *Breach of Contract*, *supra* note 7, at 372-73 n.17.

⁹⁴ *Id.* at 373.

⁹⁵ Holmes, *supra* note 13, at 452.

⁹⁶ See text accompanying note 95 *supra*.

such formulations may lead judges and lawyers to ponder and argue over *the* meaning of good faith and in this or other ways divert focus away from the issue of whether a claimed form of bad faith really is, in light of all relevant circumstantial detail, to be so characterized. Finally, the very idea of good faith, if I am right, is simply not the kind of idea that is susceptible of such a definitional approach.

All this is not to say that some of the phrases appearing in the foregoing proffered definitions have no relevant utility. As fragments of statements of *rationales* for the requirement of good faith, they plainly do. But to provide a rationale for a requirement is one thing; to define the ideas that figure in the requirement itself is another.

D. *The Determination of Bad Faith in Novel Cases—The Burton Model*

In my earlier effort on good faith, I did not try to set forth a model decision procedure for the resolution of cases of first impression, and that was one of the weaknesses of my earlier work.⁹⁷ Again, I did say that “[n]o effort has been made here to identify the criteria which judges ought to use in deciding whether particular conduct is in bad faith, although enough has been said to show that these criteria must vary from context to context.”⁹⁸ And in section II D above, I seek to identify five general factors that judges should take into account when confronting novel cases. I also claim in section II D that in many cases, judges can now turn to one or more of three additional forms of law on good faith besides section 205 itself.

Professor Burton, in a most interesting essay in the *Harvard Law Review*,⁹⁹ recently proposed a model decision procedure for the resolution of novel cases posing issues of good-faith *performance*.¹⁰⁰ The essence of his model is as follows. One of the two parties will always have what Professor Burton calls “discretion to perform.” At the time of contracting, that party will have given up some of his freedom of action, which Professor Burton calls “forgone opportunities” (to that party, a “cost” of contracting). Bad-faith contractual activity is then defined as “exercising discretion” to recapture one or more of the opportunities forgone upon entering a contract. To determine whether an opportunity was in fact forgone, it is necessary to inquire into the reasonable expectations of the “dependent party” (the other party). The party with discretion to perform acts in good faith if he does not attempt to recapture a forgone opportunity. Professor Burton also argues that “whether a particular discretion-exercising party acted to recapture forgone oppor-

⁹⁷ I did, however, set forth a recommended approach for lawyers to follow when interpreting past cases on good faith. See also note 28 *supra*.

⁹⁸ Summers, *Good Faith*, *supra* note 5, at 206.

⁹⁹ Burton, *Breach of Contract*, *supra* note 7, at 378-94.

¹⁰⁰ See also Burton, *Article 2 Good Faith*, *supra* note 7.

tunities is a question of subjective intent"—a "subjective inquiry." Moreover, the "objective inquiry" into the dependent party's reasonable expectations is not alone "dispositive." Indeed, Professor Burton stresses that instead the inquiry into state of mind is "of central importance."¹⁰¹

We may adopt one of Professor Burton's illustrations¹⁰² to try to demonstrate his model at work. Assume that *L* and *T* entered into a lease providing that *T* was to pay rentals as a percentage of the gross receipts of *T*'s business on the premises. *T* also had another store in the same town. From time to time, he diverted customers to that other store (where he owned the premises), thereby reducing the rentals otherwise payable to *L*. For this, *L* sued *T*, claiming that *T*'s diversionary tactics were in bad faith. Here, according to Professor Burton, a court should presumably find (1) that a reasonable person in *L*'s position expected to receive rentals not depleted by *T*'s diversionary acts, and (2) that *T* acted with the subjective intention of recapturing a forgone opportunity.

Professor Burton, unlike many who have criticized general requirements of good faith, does believe in them and has sought to direct his efforts largely to making them more effective. Moreover, he does not ultimately seek to resolve issues of good faith under a general requirement like section 205 through a general definition of some presumed positive content of that phrase. He also concedes that what a general good-faith requirement rules out varies to some extent depending on the context. And he generally seeks to focus on the reasons for ruling out claimed forms of bad faith. In all these respects, despite some misleading protestations to the contrary, his approach is itself generally consistent with the spirit of section 205, including its excluder conceptualization.

Professor Burton makes a number of claims on behalf of his approach, as opposed to what he calls the "traditional" approach (born not so long ago in the history of the common law and including, presumably, that of section 205). First, he says that his approach provides more analytical focus. It isolates "with greater particularity the factors that must be considered in determining good or bad-faith performance."¹⁰³ Instead of an "amorphous totality of factual circumstances," we have an inquiry into reasonable expectations of the "dependent party" and the subjective intent of the "discretion-exercising" party—all to determine precisely whether the discretion-exercising party has acted to recapture forgone opportunities so as to constitute bad faith. Is this analysis necessarily any more focused than that of section 205 in a novel good-faith performance case? Does it focus on the right things? Does it

¹⁰¹ Burton, *Breach of Contract*, *supra* note 7, at 384.

¹⁰² See *id.* at 384-85.

¹⁰³ *Id.* at 391.

go far enough? These are large questions, and I cannot now do full justice to them. I have already tried to show in this Article that section 205 provides judges with considerable guidance, not merely in novel performance cases but in performance and enforcement cases generally. It is true that Professor Burton's model introduces new terminology and appears to reduce to two questions; but I do not see that anything turns on this. Why, for example, should it "advance the analysis" to inquire whether the discretion-exercising party is seeking to "recapture forgone opportunities," rather than whether his actions fall outside the reasonable expectations of the dependent party in light of the various factors in the circumstances that legitimately shape those expectations? Or why does it help (if it does) in our foregoing lease illustration to inquire whether the tenant, in diverting customers, was trying to recapture costs incurred in entering the contract, rather than whether what the tenant did was, all things considered, contrary to the spirit of the deal?

One may also question whether the Burton model really focuses on the right things. For example, does the subjective inquiry into the discretion-exercising party's state of mind really have the central importance that is claimed?¹⁰⁴ Part of the claim, as I understand it, is that this inquiry is *typically* relevant, not just contingently so. This does not accord with section 205.¹⁰⁵ Moreover, in a great many well-decided performance cases, courts give little or no consideration to this factor.¹⁰⁶ Indeed, its independent significance in the Burton model is at least in some areas problematic. Consider, again, the lease illustration. If the court decides that the reasonable expectations of the landlord rule out the tenant's acts of diverting customers to his other store, what if anything would it add to inquire into the tenant's state of mind? It is said (a) that the "traditional analysis" focuses mainly on benefits due the promisee under the agreement and (b) that this is inadequate because the promisor may be "entitled" to withhold something in good faith.¹⁰⁷ Whether or not (a) is true, (b) does not follow. If what is due the promisee really does exclude what the promisor wants to withhold, then that will be dispositive. What one is "entitled" to withhold depends on what is due the promisee. (This is not to say that an inquiry into the promisor's state of mind can never have independent significance in good-faith performance cases.)

Further, in my view the Burton model does not go far enough.

¹⁰⁴ See *id.* at 395.

¹⁰⁵ RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment d (1979).

¹⁰⁶ See generally Summers, *Good Faith*, *supra* note 5, at 232-43 (citing cases). The main case that Professor Burton cites on the subjective inquiry is a case in which the contract embodied a clause requiring that the promisee be *satisfied* with performance. Burton, *Breach of Contract*, *supra* note 7, at 390 (citing *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912)).

¹⁰⁷ See generally Burton, *Breach of Contract*, *supra* note 7, at 387-92.

That is, it does not provide as much focus as section 205 of the *Restatement Second* and the general case law now permit. I suspect that it is now possible to develop useful lists of factors generally relevant to the determination of good-faith performance in a number of different performance contexts. Professor Burton seems content, for example, to leave the general test of reasonableness of expectations relatively unanalyzed. Yet Professors Hillman¹⁰⁸ and Holmes¹⁰⁹ have shown, in comparable good-faith contexts, that a closer analysis and differentiation of relevant factors is possible. Nothing in the excluder conceptualization embodied in section 205 is inconsistent with the articulation of such criteria. A general requirement of good faith can rule out forms of bad faith identifiable by reference to these criteria.¹¹⁰ Indeed, as I have already suggested, some such criteria in some contexts may now be ripe for formulation in rules.

Professor Burton claims that, in addition to more focus, his model provides more generality than other approaches and thus is more "law-like." In particular, he thinks it is less a "license" for the exercise of ad hoc judicial intuition.¹¹¹ Again, I fail to see why there is any less generality in the *Restatement Second* approach. Certainly each "context" to which Professor Braucher referred in the Comments consists of more than "the discrete case."¹¹² Indeed, he adopted a number of *general* categories for the classification of general types of bad faith—categories well populated with actual decisions.¹¹³ Moreover, there is no reason why the legal generalities emergent in these contexts cannot take account of factors that vary with the stage in the contracting process at which the issue of good faith arises.¹¹⁴

Finally, Professor Burton claims that his model provides a useful new "perspective and policy framework" within which good-faith performance issues are more manageable.¹¹⁵ Close analysis suggests, however, that it is less general than Professor Burton makes it seem, and that it introduces economic ideas and terminology that may breed uncertainty or confusion. I will say something further only about the first of

¹⁰⁸ See the articles by Professor Hillman in note 54 *supra*.

¹⁰⁹ See Holmes, *supra* note 13.

¹¹⁰ Professor Burton has suggested that I once believed the contrary. Thus, he suggests that in my earlier article I purported to offer the excluder analysis "instead" of criteria of decision. Burton, *Breach of Contract*, *supra* note 7, at 369-70 n.5. He states that I "was led effectively to deny that any general principle or principles could be articulated as criteria for judicial decision." Burton, *Article 2 Good Faith*, *supra* note 7, at 21 n.136. I plead not guilty to both charges.

¹¹¹ Burton, *Article 2 Good Faith*, *supra* note 7, at 21 n.136; Burton, *Breach of Contract*, *supra* note 7, at 369-70.

¹¹² This attribution appears at Burton, *Article 2 Good Faith*, *supra* note 7, at 21 n.136.

¹¹³ See RESTATEMENT (SECOND) OF CONTRACTS § 205, Comment d (1979); Summers, *Good Faith*, *supra* note 5, at 232-43.

¹¹⁴ See Burton, *Article 2 Good Faith*, *supra* note 7, at 21 n.136.

¹¹⁵ Burton, *Breach of Contract*, *supra* note 7, at 370-71 & n.8.

these observations. The model is less general because it is in truth drawn mainly from those cases in which contracting parties have in fact conferred on one of the parties some genuine discretionary power in matters of performance. Many good-faith performance cases are not of this kind; they do not confer *discretion* to perform in some way.¹¹⁶ It is not difficult to discern the likely motive here behind the Burton model. The maneuver of adopting a conceptual framework in which one party is always considered to have discretion felicitously generates the *possibility* that the "discretion-exercising" party might have failed to perform in good faith, and thus seems to give pervasive point to the "subjective inquiry" of such central importance in the model. After all, "a party with discretion may withhold all benefits for good reasons."¹¹⁷ In many cases posing issues of good-faith performance, however, there will be no such discretion and therefore no such possibility. And even when this is not so, the subjective inquiry may lack independent significance.

E. *Good Faith and Moralism*

One commentator recently expressed strong concern that courts may very likely overextend a general requirement of good faith of the kind embodied in section 205, the Comments, and the Reporter's Note, all in the name of altruism, Good Samaritanism, general benevolence, moral idealism, or the like.¹¹⁸ The shortest answer to this concern is that the extensive case law to date does not reveal any significant tendency of this kind.¹¹⁹ But a bit more should be said on this point.

The risk of overextension is inherent in any doctrine.¹²⁰ Experience to date indicates that the risk is not great with regard to section 205. This is hardly surprising. Our contract law has been relatively free of moralism, especially any forms legitimately describable as "Good Samaritanism" or the like. Moreover, legal good faith is not identical with moral good faith.¹²¹ In any event, a requirement of good faith is a minimal standard rather than a high ideal. In addition, section 205, the Comment, and the Reporter's Note incorporate safeguards. And the determinations of trial judges and jurors are subject to various forms of review.

¹¹⁶ See Summers, *Good Faith*, *supra* note 5, at 232-43.

¹¹⁷ Burton, *Breach of Contract*, *supra* note 7, at 384.

¹¹⁸ Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619.

¹¹⁹ Indeed, Professor Gillette is hard pressed to find *any* cases that look at all like the beginnings of a parade of horrors.

¹²⁰ Professor Gillette writes of the "broad discretion implied by Summers's analysis," *id.* at 646, including, presumably, "good samaritanism" (his phrase). *Id.* at 645. I can only report that I have recently re-read my article in search of support for this view, without success. And I am glad to say that one can find much in it to the contrary. See, e.g., Summers, *Good Faith*, *supra* note 5, at 265-66. See also *id.* at 198, 200, 204, 205, 206, 220, 232, 233, 243, 248, 261, 263, 264.

¹²¹ See *id.* at 204 n.46.

The ultimate question is whether the gain is worth the risk. I cannot say that all the cases so far soundly decided in major part on the basis of a general obligation of good faith would certainly have been decided the other way in the absence of such an obligation; yet certainly some of them would have. And it is also certain that some private parties acting out of court would have acted differently in interpreting contracts and settling contract disputes in the absence of such an obligation. Finally, it must be conceded that in the days before such an obligation was generally recognized, some judges sometimes used indirect and covert tools to remedy bad faith; yet this involved costs, too.

CONCLUSION

The final adoption and publication of section 205 is fairly certain to accelerate the growth of general contract law on good faith. At least two major tasks remain here for contract scholars. They will have a continuing responsibility to try to evaluate, systematize, and when the time comes, refine, this case law into more discrete categories and forms of law. They will also have the interesting task, as the case law grows, of identifying its implications for numerous other general doctrines of contract law. The discovery and recognition of these implications is almost certain to be a rich source of insight into the deeper mysteries of the social institution of contract.

APPENDIX

§ 205. Duty of Good Faith and Fair Dealing

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

Comment:

a. Meanings of "good faith." Good faith is defined in Uniform Commercial Code § 1-201(19) as "honesty in fact in the conduct or transaction concerned." "In the case of a merchant" Uniform Commercial Code § 2-103(1)(b) provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

b. Good faith purchase. In many situations a good faith purchaser of property for value can acquire better rights in the property than his transferor had. See, e.g., § 342. In this context "good faith" focuses on the honesty of the purchaser, as distinguished from his care or negligence. Particularly in the law of negotiable instruments inquiry may be limited to "good faith" under what has been called "the rule of the pure heart and the empty head." When diligence or inquiry is a condition of the purchaser's right, it is said that good faith is not enough. This focus on honesty is appropriate to cases of good faith purchase; it is less so in cases of good faith performance.

c. Good faith in negotiation. This Section, like Uniform Commercial Code § 1-203, does not deal with good faith in the formation of a contract. Bad faith in negotiation, although not within the scope of this Section, may be subject to sanctions. Particular forms of bad faith in bargaining are the subjects of rules as to capacity to contract, mutual assent and consideration and of rules as to invalidating causes such as fraud and duress. See, for example, §§ 90 and 208. Moreover, remedies for bad faith in the absence of agreement are found in the law of torts or restitution. For examples of a statutory duty to bargain in good faith, see, e.g., National Labor Relations Act § 8(d) and the federal Truth in Lending Act. In cases of negotiation for modification of an existing contractual relationship, the rule stated in this Section may overlap with

more specific rules requiring negotiation in good faith. See §§ 73, 89; Uniform Commercial Code § 2-209 and Comment.

d. Good faith performance. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Illustrations:

1. A, an oil dealer, borrows \$100,000 from B, a supplier, and agrees to buy all his requirements of certain oil products from B on stated terms until the debt is repaid. Before the debt is repaid, A makes a new arrangement with C, a competitor of B. Under the new arrangement A's business is conducted by a corporation formed and owned by A and C and managed by A, and the corporation buys all its oil products from C. The new arrangement may be found to be subterfuge or evasion and a breach of contract by A.
2. A, owner of a shopping center, leases part of it to B, giving B the exclusive right to conduct a supermarket, the rent to be a percentage of B's gross receipts. During the term of the lease A acquires adjoining land, expands the shopping center, and leases part of the adjoining land to C for a competing supermarket. Unless such action was contemplated or is otherwise justified, there is a breach of contract by A.
3. A Insurance Company insures B against legal liability for certain bodily injuries to third persons, with a limit of liability of \$10,000 for an accident to any one person. The policy provides that A will defend any suit covered by it but may settle. C sues B on a claim covered by the policy and offers to settle for \$9,500. A refuses to settle on the ground that the amount is excessive, and judgment is rendered against B for \$20,000 after a trial defended by A. A then refuses to appeal, and offers to pay \$10,000 only if B satisfies the judgment, impairing B's opportunity to negotiate for settlement. B prosecutes an appeal, reasonably expending \$7,500, and obtains dismissal of the claim. A has failed to deal fairly and in good faith with B and is liable for B's appeal expense.
4. A and B contract that A will perform certain demolition work for B and pay B a specified sum for materials salvaged, the contract not to "become effective until" certain insurance policies "are in full force and effect." A makes a good faith effort to obtain the insurance, but financial difficulty arising from injury to an employee of A on another

job prevents A from obtaining them. A's duty to perform is discharged.

5. B submits and A accepts a bid to supply approximately 4000 tons of trap rock for an airport at a unit price. The parties execute a standard form of "Invitation, Bid, and Acceptance (Short Form Contract)" supplied by A, including typed terms "to be delivered to project as required," "delivery to start immediately," "cancellation by A may be effected at any time." Good faith requires that A order and accept the rock within a reasonable time unless A has given B notice of intent to cancel.

6. A contracts to perform services for B for such compensation "as you, in your sole judgment, may decide is reasonable." After A has performed the services, B refuses to make any determination of the value of the services. A is entitled to their value as determined by a court.

7. A suffers a loss of property covered by an insurance policy issued by B, and submits to B notice and proof of loss. The notice and proof fail to comply with requirements of the policy as to form and detail. B does not point out the defects, but remains silent and evasive, telling A broadly to perfect his claim. The defects do not bar recovery on the policy.

e. Good faith in enforcement. The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. See, e.g., §§ 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts. It also extends to dealing which is candid but unfair, such as taking advantage of necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without legitimate commercial reason. See Uniform Commercial Code § 2-209, Comment 2. Other types of violation have been recognized in judicial decisions: harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract. For a statutory duty of good faith in termination, see the federal Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-25 (1976).

Illustrations:

8. A contracts to sell and ship goods to B on credit. The contract provides that, if B's credit or financial responsibility becomes impaired or unsatisfactory to A, A may demand cash or security before making shipment and may cancel if the demand is not met. A may properly demand cash or security only if he honestly believes, with reason, that the prospect of payment is impaired.

9. A contracts to sell and ship goods to B. On arrival B rejects the goods on the erroneous ground that delivery was late. B is thereafter precluded from asserting other unstated grounds then known to him which A could have cured if stated seasonably.

REPORTER'S NOTE

This Section is new. See Farnsworth, Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666 (1963); Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968); 3A Corbin, Contracts §§ 654A-I (Supp. 1980). As to the development of "good faith" in German law, see Dawson, The Oracles of the Law 461-502 (1968).

For an important discussion of the concept, see *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), applying it to an employment contract terminable at will. In *VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D.N.Y. 1969), it was held that particular conduct that would have been barred by the duty of good faith could be expressly consented to in the contract. Some of the limits of the duty are discussed in *Sessions, Inc. v. Morton*, 491 F.2d 854 (9th Cir. 1974); see also *Commercial Contractors, Inc. v. United States F. & G. Co.*, 524 F.2d 944 (5th Cir. 1975) (discussing good faith, custom of trade and a general contractor's lack of duty to help a subcontractor keep his work force intact when another subcontractor offers higher wages).

Comment b. See Gilmore, The Commercial Doctrine of Good Faith Purchase, 63 Yale L. J. 1057 (1954).

Comment c. See Kessler & Fine, Culp in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (1964); Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958); Summers, Collective Agreements and the Law of Contracts, 78 Yale L. J. 525 (1969).

Comment d. Illustration 1 is based on *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633 (8th Cir. 1957); cf. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.*, 130 F.2d 471 (3d Cir. 1942); Uniform Commercial Code § 2-306(1). Illustration 2 is based on *Daitch Crystal Dairies, Inc. v. Neisloss*, 8 A.D.2d 965, 190 N.Y.S.2d 737 (1959), *aff'd mem.*, 8 N.Y.2d 723, 201 N.Y.S.2d 101, 167 N.E.2d 643 (1960); *Carter v. Adler*, 138 Cal. App.2d 63, 291 P.2d 111 (1955); see *Annots.*, 170 A.L.R. 1113 (1947), 38 A.L.R.2d 1113 (1954); cf. *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 200 A.2d 166 (1964) (good faith of lessee); Uniform Commercial Code § 2-306(2) (obligation to use best efforts in cases of exclusive dealing in goods); *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979) (discussion of scope of "best efforts"); *Riess v. Murchison*, 503 F.2d 999 (9th Cir. 1974), *cert. denied*, 420 U.S. 993 (1975) (buyers of land required by implied obligation of good faith to produce, save and sell water on which sellers' adjoining lands were dependant); *Center Garment Co. v. United Refrig. Co.*, 369 Mass. 633,

341 N.E.2d 669 (1976) (franchisor required to make at least some effort to find supplies for franchisee when previous source was cut off). Compare *Sessions, Inc. v. Morton*, 491 F.2d 854 (9th cir. 1974) (no implied obligation on lessors to agree to dedicate significant portion of land to public use even though dedication might be necessary to permit lessee to develop land). Illustration 3 is based on *Brassil v. Maryland Cas. Co.*, 210 N.Y. 235, 104 N.E. 622 (1914); see Annot., 69 A.L.R.2d 690 (1960); cf. Annot., 40 A.L.R.2d 168 (1955) (insurer's duty to settle); Keeton, *Ancillary Rights of the Insured Against His Liability Insurer*, 134 Vand. L. Rev. 837 (1960); *Spindle v. Travelers Ins. Cos.*, 66 Cal. App. 3d 951, 136 Cal. Rptr. 404 (1977), discussed below in connection with Comment e. Illustration 4 is based on *Omaha Pub. Power Dist. v. Employers' Fire Ins. Co.*, 327 F.2d 912 (8th Cir. 1964). Illustration 5 is based on *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (2d Cir. 1945); cf. Uniform Commercial Code § 2-309(3). Illustration 6 is based on *Pillois v. Billingsley*, 179 F.2d 205 (2d Cir. 1950); see also *In re Estate of Hollingsworth*, 88 Wash.2d 322, 560 P.2d 348 (1977); cf. *California Lettuce Growers, Inc. v. Union Sugar Co.*, 45 Cal.2d 474, 484, 289 P.2d 785, 791 (1955) (power to fix price of goods); Uniform Commercial Code § 2-305(2) (same). Illustration 7 is based on *Johnson v. Scottish Union Ins. Co.*, 160 Tenn. 152, 22 S.W.2d 362 (1962); cf. Uniform Commercial Code § 2-311 (cooperation in sale of goods).

Comment e. See Kessler & Brenner, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 Yale L.J. 1135 (1957). Several courts have found that an express power to terminate a contract at will was modified by a duty of good faith. See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (salesman's employment contract); *Spindle v. Travelers Ins. Cos.*, 66 Cal. App.3d 951, 136 Cal. Rptr. 404 (1977); 26 Drake L. Rev. 883 (1976-77) (termination of physician's malpractice insurance allegedly as part of scheme to intimidate the profession to accept higher premiums; court analogized from the insurer's duty to settle claims in good faith, see Illustration 3, supra); *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (termination of dentist's malpractice insurance as retaliation because he testified against other dentist insured by same carrier); *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973), cert. denied, 415 U.S. 920 (1974) (termination of service station franchise; court reasoned both from dominant position of franchisor and from Legislature's enactment of franchising statute not applicable to particular transaction). Illustration 8 is based on *James B. Berry's Sons Co. v. Monark Gasoline & Oil Co.*, 32 F.2d 74 (8th Cir. 1929); cf. Uniform Commercial Code §§ 1-208, 2-609. Illustration 9 is based on *Fielding v. Robertson*, 141 Va. 123, 126 S.E. 231 (1925); cf. § 248; Uniform Commercial Code § 2-605(1)(a).